



Testimony of Becky Straus
Legislative Director, ACLU of Oregon
Fairness Hearing regarding *United States of America v. City of Portland*
Case No. 3:12-cv-02265-SI
February 18, 2014

To the Honorable Judge Michael Simon:

Thank you for the opportunity to provide input on the pending Settlement Agreement (“Agreement”) between the U.S. Department of Justice (“DOJ”), the City of Portland (“City”), and the Portland Police Bureau (“Bureau”). The manner in which you have conducted these proceedings, soliciting public comment and engaging the community to an unprecedented degree, is refreshing and encouraging. We, like you, are working for an outcome that is the most just for the parties and, by extension, for the people most affected by the Bureau’s actions.

Despite the significant shortcomings of the Agreement, some of which we have detailed below, we recognize that the Court’s acceptance of the Agreement will allow Portland to take the next steps forward toward a more fair public safety system. We therefore lend our support to that action, but only if this Court continues to take creative actions designed to ensure that the City follows through on these commitments and remains open to taking additional steps in the future.

Toward that end, we ask the Court to:

1. Clarify explicitly that the Court grants authority to the AMA Coalition to revive the case in your courtroom should the parties fail to comply with the terms of the Agreement; and
2. Provide clear guidance to the parties regarding the Court’s expectations as to what will constitute compliance.

With these modest assurances in place, we would support your acceptance of the Agreement so that all of the stakeholders in the City of Portland can begin the hard work of true reform within the Bureau.

History

For almost six decades the American Civil Liberties Union of Oregon has monitored the activities of the Portland Police Bureau and advocated for professional policing that respects the civil liberties and civil rights of all persons, including police officers. We have advocated for transparency and independent review of police practices and policies in the belief that openness and accountability by the Bureau will lead to a true partnership with the community, better policing and greater public safety.

We supported calls for DOJ to initiate an investigation of the Bureau's patterns and practices as they relate to engaging with people in Portland in respect of their civil rights. Following release of DOJ's formal findings, we undertook numerous efforts to influence the path forward. On September 27, 2012 we submitted, in partnership with allied organizations, a set of detailed recommendations to DOJ urging specific reforms be incorporated into the Agreement. On October 19, we submitted further comments to the Bureau, urging revisions to its proposed policy changes related to Application of Force, Deadly Physical Force, and Tasers. And on November 1, we testified before the Portland City Council to the strengths and weaknesses of the Agreement. Each of these sets of comments is attached to this testimony.

Today we join our community partners in proceeding cautiously but optimistically toward the promise of real reform. The acceptance of the Agreement, with our additional recommendations, is the next step.

Shortcomings of the Agreement

At the culmination of over a year of investigation, DOJ found that the Bureau engages in a pattern or practice of subjecting individuals with actual or perceived mental illness to excessive force in violation of the Fourth Amendment to the Constitution and other laws of the United States. This pattern or practice includes, but is not limited to, the following:

- Police encounters with such individuals too frequently result in a higher level of force than necessary;
- Officers use electronic control weapons ("ECWs") commonly referred to as "Tasers," in circumstances when such force is not justified, or deploy ECWs more times than necessary on an individual; and
- Officers use a higher degree of force than justified for low-level offenses.¹

DOJ's investigation also identified serious deficiencies in policies, training, and officer accountability measures that substantially contributed to the pattern or practice of excessive force.²

In their Complaint filing to this Court, DOJ seeks injunctive relief to eliminate the Defendant's violations of the law and to ensure that PPB implements sustainable reforms that establish constitutional policing practices.³ Naturally, then, we must settle for nothing less when we decide whether or not the Agreement negotiated by the parties is fair.

Shortcomings of the Agreement erect significant barriers to reaching that outcome. As expressed in our November 1 testimony, referenced above and attached, the Agreement does not adequately address the changes needed in the system of officer oversight and accountability. Despite the fact that the Complaint cites deficiencies in officer accountability measures as among the factors that "substantially contributed" to DOJ's finding of an unconstitutional pattern and practice of policing, the parties insist on essentially neglecting meaningful reform of this area in

¹ *United States of America v. City of Portland*, 3:12-cv-02265-SI, Complaint, Paragraph 9

² *Ibid*, Paragraph 14

³ *Ibid*, Paragraph 11

the Agreement. Steps such as enhancing the authority of the Independent Police Review Division and the Citizen Review Committee to compel officer testimony, abandonment of the long-problematic “48-hour rule,” and a revised standard of review to guide the Citizen Review Committee’s analysis of appeals, would demonstrate a more genuine commitment to accountability. Unfortunately, the Agreement fails to take any of these steps.

Just as significant, the Agreement lacks the “teeth” necessary to ensure the City’s compliance with the reforms that are included within its pages.

At every opportunity that has been provided to influence the Agreement’s terms, we have advocated for an independent monitor with court authority. The development and implementation of the Agreement is a watershed moment for Portland, presenting the possibility of significant reform of our broken public safety system. However, because there is no independent monitor in place with the authority to revive this case if the City or the Bureau is not complying, we fear that there is not enough accountability to ensure that what is mandated will ever take place.

The Compliance Officer Community Liaison (“COCL”) position plays a role in this monitoring, but is not enough because that person will not be an agent of the court. Ultimately, the ability of the COCL to hold the parties accountable is weak. Reliance on DOJ to track compliance at the level of detail necessary to ensure all terms are implemented is also insufficient. Without an independent monitor with court authority, the legal consequences for non-compliance are inadequate because failures in implementation may never be brought to the Court’s attention for review.

In similar suits in other jurisdictions, including New Orleans⁴, Pittsburgh⁵, Los Angeles⁶, and Seattle⁷, agreements between the parties have installed an independent monitor with court authority. Portland should take police reform as seriously as each of these other cities, but the structure put in place to ensure reform does not reflect that commitment.

Recommendations

There are things that this court can do in an attempt to mitigate the damage of the Agreement’s shortcomings. Short of advocating for a rejection of the Agreement as a whole to renegotiate specific provisions, we recommend two modest changes.

In response to its Motion to Intervene, your honor granted to the AMA Coalition “enhanced amicus” status to elevate to the negotiating table voices from the Portland community. To address our concern that the Agreement lacks an independent monitor function with court authority, we recommend that you grant authority to the AMA Coalition to bring any substantial violation of the Agreement to the Court’s attention. Rather than rely on the COCL, who is essentially an agent of the City, or rely on DOJ to notify the Court of any noncompliance, this

⁴ Consent Decree Regarding the New Orleans Police Department, 2:12-cv-01924-SM-JCW, Section XIX

⁵ Consent Decree, Civil No. 97-0354, Paragraph 70

⁶ Consent Decree, Civil No. 00-11769 GAF, Section XI

⁷ Settlement Agreement and Stipulated [Proposed] Order of Resolution, 2:12-cv-01282-JLR, Section IV

Court should enable an agent of the community to equally access this remedy. The AMA Coalition should be entitled to the same remedy available to the parties pursuant to the Enforcement section of the Agreement.⁸

Similarly, we recommend that you provide further guidance on the definition of “substantial compliance”⁹ with the Agreement. This case carries a uniquely significant degree of public importance and for that reason all eyes in Portland are watching intently as the case advances to each new stage. How will the parties know when non-compliance is “systemic” and when it is “minor or occasional” and therefore not significant? Further guidance on what compliance looks like will help to manage the expectations of those in the community who are committed to reform of the Bureau and will better assist the parties to gauge the City’s progress.

Thank you again for the opportunity to provide comments in regard to the fairness of the Agreement. Your willingness to open the process to the public, including members of the community that often feel disillusioned or disenfranchised by the legal system, will have a meaningful impact on the likelihood of success of police reform in Portland. We greatly appreciate your consideration of our recommendations. Please do not hesitate to contact me at any time with questions or for additional details or follow-up.

Sincerely,

Becky Straus
Legislative Director
ACLU of Oregon

⁸ *United States of America v. City of Portland*, 3:12-cv-02265-SI, Settlement Agreement Pursuant to Fed. R. Civ. P. 41(a)(2), Paragraphs 178-186 (that outline the process of mediation and reporting to the court in the event of substantial non-compliance).

⁹ *Ibid*, Paragraph 178